ASIA LIFE ASSURANCE SOCIETY LTD.

v.

KONG LEONG AIK

HIGH COURT BORNEO, KUCHING
HAIDAR MOHD. NOOR J
[CIVIL APPEAL NO. KG. 26 OF 1991]
20 FEBRUARY 1992

CIVIL PROCEDURE: *Application to strike out defence - Dismissal by Court - Subsequently application made for summary judgment - Preliminary objection raised that the doctrine of res judicata bars the application for summary judgment.*

The appellant/plaintiff had on 9 January 1989 applied under O. 14 r. 21 Subordinate Court Rules 1980 to strike out the respondent/defendant's defence. This application was dismissed and the appellant appealed against this decision but later withdrew the appeal and proceeded to file an application for summary judgment under O. 26A of SCR. Respondent's Counsel raised two preliminary objections against the O. 26A filed, one being the doctrine of *res judicata*. This was accepted by the learned Sessions Court Judge, dismissing the O. 26A application. The appellant then appealed.

Held:

[1] The doctrine of *res judicata* comes into play when a party can show the existence of a former writ involving the same parties upon the same subject-matter or action and points of dispute upon which the Court had made a final decision.

[2] In both an O. 26A application and an O. 14 r. 21 application, the Court must ask itself whether there are triable issues and whether the defence is a sham. In the instant case, a decision was made as regards the O. 14 r. 21 application giving leave to defend. This application is merely an **order** that there should not be a judgment for the appellant at this stage. Since the doctrine of *res judicata* requires the issues in dispute to have been finally decided by the Court, the doctrine was not applicable here as no judgment had been given. The learned Judge had misdirected himself when he accepted the argument that *res judicata* applied.

[3] Though the appellant had discretion to proceed either under O. 14 r. 12 or O. 26A of SCR, he could not proceed on both.

[4] The learned Sessions Court Judge had found that 'certain arguable points of law had been raised' by the respondent in the O. 14 r. 21 hearing. It is difficult to see how the appellant can thereby succeed in an O. 26A application in the light of this finding. Thus the O. 26A application may be properly considered an abuse of the process of Court and may be dismissed under the inherent jurisdiction of the Court. The order of the Judge in the Court below was affirmed but based on reasons given above.

[Appeal dismissed with costs and the learned Sessions Court Judges's order affirmed.]

Cases referred to:

Wee Bing Po v. Dayang Anak Ngipa [1974] 2 MLJ ***(foll)***
Henderson v. Henderson 67 ER 319 ***(foll)***
United Commercial Bank v. Yap Cheng Hai & Ors. [1980] 1 MLJ 207 ***(foll)***
Wagon Engineering Sdn. Bhd. v. Sulaiman Buloh Semenanjung Enterprise Sdn. Bhd. [1988] 2 CLJ (Rep) 533 ***(refd)***

Legislation referred to:
Subordinate Courts Rules O. 14 r. 21, O. 26A

For the appellant - Kilat Beriak; M/s. Chew Jugah, Wan Ullok, Goh & Co.
For the respondent - P. Phang; M/s. Reddi & Co.

JUDGMENT

Haidar Mohd. Noor J:

This is an appeal against the order made by the learned Sessions Court Judge on 26 July 1991 ruling in favour of the respondent in respect of the objection raised to resist the application of the appellant for summary judgment under O. 26A of the Subordinate Courts Rules 1980 ('SCR').

From the ruling of the learned Sessions Court Judge, it would appear that the learned Counsel for the respondent relied on two grounds in respect of the objection raised:

(1) *Res judicata*.

(2) Undue delay on the part of the appellant in filing the application for summary judgment.

In his written ruling the learned Sessions Court Judge chose to consider and decided only on the issue of *res judicata* and went on to say that it was not necessary for him to consider the question of inordinate delay.

It is apparent therefore that in this appeal I should address my mind only on one issue, that is, whether the learned Sessions Court Judge was right to rule that *res judicata* is applicable in this case. The abuse of the process of the Court was obviously considered by the learned Sessions Court Judge as a consequence of his ruling on the application of the doctrine of *res judicata* in this case.

The facts that gave rise to the learned Sessions Court Judge upholding the preliminary objection on *res judicata* are:

1. The appellant filed an application on 9 January 1989 under O. 14 r. 21 of SCR for striking out the defence.
2. The application of the appellant was dismissed on 29 April 1989 on the view taken by the learned Sessions Court Judge that "certain arguable points of law have been raised. This is not an obvious case where I should allow the application. In the circumstances I will dismiss the application with costs to be taxed."
3. The appellant appealed against the order of the learned Sessions Court Judge. However, on 12 April 1990, the appellant for reasons best known to it withdrew the appeal.
4. Subsequently, on 24 May 1990 the appellant filed an application for summary judgment under O. 26A of SCR which was dismissed by the learned Sessions Court Judge on the objection raised by the respondent. This is the subject matter of the present appeal.

It would seem that the learned Sessions Court Judge stated quite correctly the doctrine of *res judicata* (see pp. 8 and 9 of the appeal record). The question is whether he has correctly applied the doctrine of *res judicata* on the facts of the present case. Tan Chiaw Thong J (as he then was) in the case of *Wee Bing Po v. Dayang Anak Ngipa* [1974] 2 MLJ at p. 57 quoted with approval the *dicta* of Wigram VC in *Henderson v. Henderson* 67 ER 319 on the pleas of *res judicata*:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and **pronounces a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable** diligence, might have brought forward at that time.
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> (emphasis is mine)

In other words, for the doctrine to apply, a party has to show that there was a former writ between the parties for the same subject matter or action and also that the matter directly and subsequently in issue has been heard and **finally decided by the Court which heard it.** There must therefore be a finality on the issue or issues before the Court. The application under O. 14 r. 21 and O. 26A of SCR are merely steps in one action. Unless the matter decided on is final, that is, a summary judgment is given or defence is struck out and judgment entered accordingly otherwise such steps are interlocutory steps in the action. It is to be noted that the decision of the Court in respect of both application is centered on whether there are triable issues and the defence is not a sham one. The decision to give leave to defend is not a judgment but an order that there should not be a judgment for the appellant. As Sinnathuray J said in *United Commercial Bank v. Yap Cheng Hai & Ors.* [1980] 1 MLJ at p. 207:

> In my view, for *res judicata* or estoppel by record to raise, putting the matter broadly, there must be a judgment on the issues that are before the Court, and **an order giving leave to defend is not a judgment.** It is a decision. Indeed, it is a decision that there should not be judgment for the plaintiffs.
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> (emphasis is mine)

As leave to defend was given to the respondent, in my view, the doctrine of *res judicata* is not applicable and the learned Sessions Court Judge, therefore has misdirected himself on the application of the doctrine of *res judicata* on the facts of the present case.

Having thus ruled that the learned Sessions Court Judge, had erred in ruling in favour of the respondent, what sort of order should I then make.

No doubt it is a matter for the appellant's discretion to proceed either under O. 14 r. 12 or O. 26A of SCR but I do not think the appellant could proceed on both (see *Wagon Engineering Sdn. Bhd. v. Sulaiman Buloh Semenanjung Enterprise Sdn. Bhd.* [1988] 2 CLJ (Rep) 533*)*. In essence in both applications, the Court will have to consider the defence. Counsel for the appellant argued that the application for summary judgment was subsequently filed after having obtained certain documents. In my view the appellant should not have rushed to file the earlier application as after all the documents to my mind are not difficult to trace and should be within the possession of the appellant. If the appellant elected to do a rushed job then the appellant will have to take the risks and face the consequences. Having failed in the application to strike out the defence I do not see how the appellant can now proceed for summary judgment when essentially the Court ruled that there are triable issues that should go for trial. Hence, in my view, the application of the appellant can be properly considered as an abuse of the process of the Court and the Court is therefore entitled under its inherent jurisdiction to dismiss the application accordingly. Even though I ruled that the learned Sessions Court Judge erred in his ruling in dismissing the application of the appellant for summary judgment based on the doctrine of *re judicata* but I am of the view, that the

order was correctly made for the reasons set out by me. In the circumstances the proper order I should make is to affirm the order made by the learned Sessions Court Judge. The appeal is dismissed with costs.

Also found at [1992] 4 CLJ 2053